126

(9)

FILED
APR 9 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-945

In the
Supreme Court of the United States

EMPRESS CASINO JOLIET CORP., *ET AL.*, PETITIONERS,

v.

ALEXI GIANNOULIAS, *ET AL.*, RESPONDENTS.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF IN OPPOSITION

WILLIAM J. MCKENNA
MARTIN J. BISHOP
JONATHAN W. GARLOUGH
Foley & Lardner LLP
321 North Clark Street
Chicago, Illinois 60654

Counsel for Respondents Balmoral Racing Club, Inc. & Maywood Park Trotting Assoc., Inc.

EDWARD M. WHITE
MICHAEL J. MURRAY
Carey, Filter, White & Boland
33 West Jackson Boulevard
Chicago, Illinois 60604

Counsel for Respondent Hawthorne Race Course, Inc.

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
JERALD S. POST
Ass't Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698

Counsel for Respondents Alexi Giannoulias & The Illinois Racing Board

*Counsel of Record

QUESTION PRESENTED

Nine riverboat casinos currently operate with Illinois gambling licenses. State law makes clear that they have no property interest in these licenses, but in exchange for contributions to the public welfare and compliance with comprehensive state gaming regulations, their licenses exempt them from Illinois' criminal anti-gambling laws.

Do these Illinois casinos have a property interest for Takings Clause purposes in the undiminished value of their gambling licenses and, even if so, is it a "taking" of "property" to tax casinos on a fraction of the gaming earnings derived from their licenses, where the tax supports a recognized public purpose and requires the payment of money, without regard to its source, that is unaffiliated with any interest in property?

RULE 29.6 STATEMENT

Balmoral Racing Club, Inc. and Maywood Park Trotting Association, Inc. are wholly owned subsidiaries of World Wide Wagering, Inc., a Delaware corporation.[1] World Wide Wagering, Inc. has no parent, and none of its shares is held by a publicly traded company.

Hawthorne Race Course, Inc., an Illinois corporation, has no parent and none of its shares is held by a publicly traded company.

---

[1] Petitioners and *amici* improperly reference Balmoral Park Trot, Inc. as a respondent in this proceeding. The correct entity is Balmoral Racing Club, Inc. Pet. App. 5a.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT 3

REASONS FOR DENYING THE PETITION 10

I. This Case Does Not Pose The Question Presented, Nor Is It A Vehicle To Revisit The Relationship Between A "Taking" And A "Tax" 11

II. Petitioners Cannot Establish A Property Interest In The Undiminished Value Of Their Gambling Licenses 25

CONCLUSION 35

TABLE OF AUTHORITIES

Cases: **Page:**

Arch-View Casino Cruises, Inc. v. Ill. Gaming Bd.,636 N.E.2d 42 (Ill. App. Ct. 1994) 4

Ass'n of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246 (D.C. Cir. 1998) 20, 21

Atlas Corp. v. United States, 895 F.2d 745 (Fed. Cir. 1990) 15-16

A.T. Massey Coal Co. v. Massanari, 305 F.3d 226 (4th Cir. 2002) 20, 21

Bennis v. Michigan, 516 U.S. 442 (1996) 32

BHA Investments, Inc. v. Idaho, 63 P.3d 474 (Idaho 2003) 15, 16, 28, 33

Bobbie Preece Facility v. Commonwealth of Ky., 71 S.W.3d 99 (Ct. App. Ky. 2002) 11, 33

Bowen v. Gillard, 483 U.S. 587 (1987) 30

Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41 (1986) . . 30

Bronco Wine Co. v. Jolly, 29 Cal. Rptr. 3d 462 (Ct. App. 2005) 28, 33

Brown v. Legal Found. of Wash.,
538 U.S. 216 (2003) 12, 13

Buhmann v. Montana,
201 P.3d 70 (Mont. 2008) 32, 33

Carney v. Attorney General,
890 N.E.2d 121 (Mass. 2008) 32, 33

Cleveland v. United States, 531 U.S. 12 (2000) . . . 29

Commonwealth Edison Co. v. United States,
271 F.3d 1327 (Fed. Cir. 2001) 15, 16, 20

Connolly v. Pension Benefit Gty. Corp.,
475 U.S. 211 (1986) 31

Conti v. United States,
291 F.3d 1334 (Fed. Cir. 2002) 28

Corn v. Lauderdale Lakes,
95 F.3d 1066 (11th Cir. 1996) 26

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998) . . . . . *passim*

Ehrlich v. Culver City, 911 P.2d 429 (Cal. 1996) . . 18

Franklin County Convention Facilities Auth.
v. Am. Premier Underwriters, Inc.,
240 F.3d 534 (6th Cir. 2001) 20, 21, 22

Hawkeye Commodity Promotions, Inc. v.
Vilsack,486 F.3d 430 (8th Cir. 2007) . . 27, 28, 33

Home Builders Ass'n v. City of Beavercreek,
729 N.E.2d 349 (Ohio 2000) 18

Home Builders Ass'n v. City of Scottsdale,
930 P.2d 993 (Ariz. 1997) 18

Home Builders Ass'n of Greater Des Moines v. West Des Moines, 644 N.W.2d 339
(Iowa 2002) 15, 16

Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976) . . 24

Iannelli v. United States,420 U.S. 770 (1975) 29

Kirk v. Denver Publ'g Co.,
818 P.2d 262 (Colo. 1991) 16, 17

Lingle v. Chevron U.S.A., Inc.,
544 U.S. 528 (2005) 26, 30

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982) 31

Lucas v. S.C. Coastal Council,
505 U.S. 1003 (1992) 31

Marvin v. Trout, 199 U.S. 212 (1905) 29

McCarthy v. City of Leawood,
894 P.2d 836 (Kan. 1995) 18

MEC Pennsylvania Racing, Inc. v. Pennsylvania State Horse Racing Comm'n, 827 A.2d 580 (Pa. Commw. Ct. 2003) 28

Mibbs, Inc. v. South Carolina Dep't of Revenue, 524 S.E.2d 626 (S.C. 1999) 33

Mitchell Arms, Inc. v. United States, 7 F.3d 212 (Fed. Cir. 1993) 28, 30, 33

Northern Ill. Home Builders Ass'n v. County of Du Page, 649 N.E.2d 384 (Ill. 1995) 7, 13, 14, 18

Parella v. Retirement Bd. of the Rhode Island Employees' Retirement Sys., 173 F.3d 46 (1st Cir. 1999) 20

Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104 (1978) 30, 31

Phillips v. Wash. Legal Found., 524 U.S. 156 (1998) 12, 13, 26

Raceway Park, Inc. v. Ohio, 356 F.3d 677 (6th Cir. 2004) 27, 31, 33

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 25, 26, 29, 30

Smith v. Price Dev. Co., 125 P.3d 945 (Utah 2005) 16, 17

Sowma v. Parker, 22 A.2d 513 (Vt. 1941) 33

Star Northwest, Inc. v. City of Kenmore,
No. C05-2133P, 2006 WL 2372395
(W.D. Wash. Aug. 10, 2006) 33

Stone v. Mississippi, 101 U.S. 814 (1879) 29

Swisher Int'l, Inc. v. Schafer,
550 F.3d 1046 (11th Cir. 2008) 20, 21

*Town of Flower Mound v. Stafford Estates
Ltd. P'ship*, 135 S.W.3d 620 (Tex. 2004) 18

Trimen Dev. Co. v. King County,
877 P.2d 187 (Wash. 1994) 18

*United States & Fed. Commc'ns Comm'n v.
Edge Broad*, 509 U.S. 418 (1993) 29

*United States Fidelity & Guaranty Co. v.
McKeithen*, 226 F.3d 412
(5th Cir. 2000) 16, 17, 20, 22

United States v. Fuller,
409 U.S. 488 (1973) 26, 27, 28, 32

United States v. Rands, 389 U.S. 121 (1967) 32

United States v. Sperry Corp.,
493 U.S. 52 (1989) 31

Unity Real Estate Co. v. Hudson,
178 F.3d 649 (3d Cir. 1999) 20

Vanek v. State Board of Fisheries,
193 P.3d 283 (Ak. 2008) 28

Webb's Fabulous Pharmacies, Inc. v. Beckwith,
449 U.S. 155 (1980) 12, 13

Statutes and Regulations:

Pub. Act 94-0804, § 1(1) 6

Pub. Act 94-0804, § 1(2)-(3) 6

Pub. Act 94-0804, § 1(3)-(4) 6

Pub. Act 94-0804, § 1(4) 3

230 ILCS 5/1 *et seq.* (2006) 3

230 ILCS 5/1.2 (2006) 3

230 ILCS 5/1.2(a) (2006) 3

230 ILCS 5/1.3(a) (2006) 6

230 ILCS 5/28.1 (2006) 3

230 ILCS 5/54.5(a) (2006) 6

230 ILCS 5/54.5(b) (2006) 7

230 ILCS 10/1 *et seq.* (2006) 3

230 ILCS 10/2 (2006) 3

230 ILCS 10/2(b) (2006) 5

230 ILCS 10/4 (2006) 6

230 ILCS 10/5(b)(1) (2006) 29

230 ILCS 10/5(b)(6) (2006) 5

230 ILCS 10/5(c)(11) (2006) 4, 29

230 ILCS 10/5(c)(12) (2006) 5

230 ILCS 10/7 (2006) 29

230 ILCS 10/7(a) (2006) 6

230 ILCS 10/7(b)(3) (2006) 4

230 ILCS 10/7(e) (2006) 3

230 ILCS 10/7(g) (2006) 4

230 ILCS 10/7.1 (2006) 4

230 ILCS 10/7.3 (2006) 4

230 ILCS 10/7.3(c) (2006) 5

230 ILCS 10/7.4 (2006) 5

230 ILCS 10/8 (2006) 5

230 ILCS 10/9 (2006) 5

230 ILCS 10/12(a) (2006) 5

230 ILCS 10/12(a-5) (2006) 5

230 ILCS 10/12(b) (2006) 5

230 ILCS 10/13 (2006) 6

230 ILCS 10/13(a-3) (2006) 6

230 ILCS 10/13(a-4) (2006) 6

230 ILCS 10/13(a-10) (2006) 25

720 ILCS 5/28-3 (2006) 3

1927 Ill. Laws 28 3

86 Ill. Admin. Code § 3000.230(c)(2) 4

86 Ill. Admin. Code § 3000.235 . . . . . 4, 28

86 Ill. Admin. Code § 3000.236(b) 4

86 Ill. Admin. Code § 3000.300 5

86 Ill. Admin. Code § 3000.310 5

86 Ill. Admin. Code § 3000.320 5

86 Ill. Admin. Code § 3000.1105 . . . . . 4, 5, 28

Miscellaneous:

www.igb.state.il.us/annualreport /2008igb.pdf. 7

www.igb.state.il.us/mics/index.pdf. 5

94th Ill. Gen'l Assembly, H.R., April 26, 2006 3

BRIEF IN OPPOSITION

The certiorari petition should be denied. Quite simply, this is not the case that petitioners make it out to be. They stake their entire petition on the provocative premise that the Illinois Supreme Court has announced a "per se rule" exempting money from protection under the Takings Clause. But this premise is demonstrably false, for the court below carefully limited its holding to avoid such a sweeping rule. Petitioners dedicate much of their petition to this straw-man reading of the holding below—how it purportedly conflicts with this Court's case law and implicates a split in lower court authority. But none of this responds to the Illinois Supreme Court's actual (and unremarkable) holding that the Takings Clause does not apply here because petitioners are objecting to a tax requiring them to pay money that is unaffiliated with any fund or any interest in real or personal property. This reflects precisely the distinction that five members of this Court, relying on prior case law, drew in *Eastern Enterprises v. Apfel*, and ultimately petitioners ask this Court merely to reconsider the application of this established distinction to the facts here. But even this effort at error correction fails, for much of what petitioners challenge are the Illinois Supreme Court's controlling conclusions of state law, and petitioners ignore the dispositive fact that they are part of a state-licensed, limited gambling monopoly.

This last point also raises a larger, threshold problem that disqualifies this case as a vehicle to reach the question presented in the petition. Petitioners paint themselves as "disfavored" businesses forced to subsidize more politically influential competitors in a

free and open market. But nothing could be further from the truth. Unlike the "big box" stores and other competitive market participants that petitioners predict are next in line for a similar tax—and that their *amici* seek to protect—petitioners hold revocable licenses entitling them to operate in a limited, state-managed gambling monopoly. These facts not only drastically affect the traditional takings analysis (making this an idiosyncratic case for rethinking or even applying that analysis), but they are independently fatal to petitioners' takings claim (meaning there is no way even to reach the question that petitioners pose, were it presented). Courts refuse to extend takings protections to laws reducing the value of licenses, especially where, as here, state law makes clear that the licenses are not property, claimants operate in a field subject to comprehensive regulation, and the State shields claimants from competition from new market entrants by permitting them to engage in conduct that the State could eliminate entirely through its police power. Neither petitioners nor their *amici* suggest that any of these grounds is worthy of review, yet they alone require rejection of petitioners' takings claim.

STATEMENT

1. Gambling is illegal in Illinois, 720 ILCS 5/28-3 (2006), with very limited exceptions. Since 1927, Illinois has allowed parimutuel betting on horse racing, 1927 Ill. Laws 28—provided operators obtain a state license and submit to intensive state gaming regulation, 230 ILCS 5/1 *et seq.* (2006)—"to benefit the people of the State of Illinois by assisting economic development and promoting Illinois tourism," 230 ILCS 5/1.2 (2006). The results have been positive. Not only do tracks contribute to the public fisc through a daily tax on betting income, 230 ILCS 5/28.1 (2006), but horse racing has created an estimated 37,000 jobs, Pub. Act 94-0804 ("Act"), § 1(4). "Illinois agriculture and other businesses * * * support and supply the horse racing industry," *ibid.*, making horse racing "a significant component within the agribusiness industry," 230 ILCS 5/1.2(a) (2006). Meanwhile, other quarters, such as the show horse industry, enjoy collateral benefits as well. 94th Ill. Gen'l Assembly, H.R., April 26, 2006, at 65.

2. In 1990, in an effort to generate additional revenue for education, the General Assembly extended legalized gambling to include a small number of riverboat casinos. 230 ILCS 10/2 (2006). The Riverboat Gambling Act ("Gambling Act"), 230 ILCS 10/1 *et seq.* (2006), established ten "owners licenses" (nine are currently active) whose holders may operate riverboat casinos in designated areas throughout the State, with all regions of the State sharing in the economic benefits. 230 ILCS 10/7(e) (2006). In selecting licensees, the Gambling Act and its implementing regulations require the Illinois Gaming

Board to consider nearly a dozen factors, *Arch-View Casino Cruises, Inc. v. Ill. Gaming Bd.*, 636 N.E.2d 42, 43 (Ill. App. Ct. 1994), including "the highest prospective revenue to be derived by the State," 230 ILCS 10/7(b)(3) (2006); *see Arch-View*, 636 N.E.2d at 43; 86 Ill. Admin. Code § 3000.230(c)(2), and more broadly "the interests of the citizens of Illinois," *Arch-View*, 636 N.E.2d at 46. The four petitioners are the highest grossing of the current licensees.

a. Under Illinois law, a gambling license "does not create a property right." 86 Ill. Admin. Code § 3000.1105. The license remains a "revocable privilege," *ibid.*, which may not be transferred or even pledged as security without Gaming Board approval, 86 Ill. Admin. Code § 3000.235. It is renewable upon the payment of a fee and a determination that the licensee continues to meet all statutory and regulatory requirements, 230 ILCS 10/7(g) (2006), following a consideration of any other information that the Board deems appropriate, 86 Ill. Admin. Code § 3000.236(b). The Board also may invoke procedures to revoke or suspend licenses "as it sees fit," 230 ILCS 10/5(c)(11) (2006), and if a license is revoked or not renewed, the Board may re-issue it to another applicant, 230 ILCS 10/7.1 (2006), or may choose simply to conduct the former licensee's gambling operations itself, 230 ILCS 10/7.3 (2006).

Meanwhile, license holders must adhere to comprehensive state gambling rules. The Gambling Act is "designed to strictly regulate the facilities, persons, associations and practices relating to gambling operations pursuant to the police powers of the State." 230 ILCS 10/2(b) (2006). And casino

owners are not the only ones who must be licensed; those who manage the gambling must obtain "managers licenses," anyone who works on a casino riverboat must obtain an "occupational license," and anyone who provides "any equipment, devices, or supplies to a licensed riverboat gambling operation" must obtain a "suppliers license." 230 ILCS 10/7.4, 10/8, 10/9 (2006). The Gaming Board supervises all gambling operations, and its inspectors and agents must be present whenever gambling is in progress. 230 ILCS 10/5(b)(6), 10/7.3(c) (2006). Moreover, the Board may exclude persons from riverboats whose reputation it believes would call the integrity of gambling operations into question. 230 ILCS 10/5(c)(12) (2006). And even beyond these and other specific rules established by statute and regulation, owner licensees must conform to a general, "suitability" requirement and implement internal control systems consistent with Board-promulgated, "Minimum Internal Control Standards" covering over one hundred areas of operation. 86 Ill. Admin. Code §§ 3000.300, 3000.310, 3000.320, 3000.1105; www.igb.state.il.us/ mics/index.pdf.

b. In addition to initial licensing and renewal fees, licensees are subject to a series of daily taxes, by which the State collects a portion of the revenue derived from its limited gaming monopoly. Each day, owners must pay a per-capita admission tax and managers a per-capita admission fee, both of which go in part to local governments. 230 ILCS 10/12(a), (a-5), (b) (2006). Owners also must pay a daily privilege tax, assessed as a percentage of the prior day's adjusted gross receipts ("gross receipts less winnings paid to wagers"), which benefits, *inter alia*, local governments, the State Police,

the Illinois Department of Human Services, and the Education Assistance Fund. 230 ILCS 10/4, 10/13 (2006).

3. Riverboats and horse racing compete in the same gambling industry, 230 ILCS 5/1.3(a) (2006), and by 2006 the General Assembly recognized that the riverboats were having "a negative impact on horse racing," Act § 1(1). Racing had experienced a 42% decline in on-track wagering since riverboat gaming was introduced, *ibid.*, and this steep decline was inflicting severe damage on the State's breeding industry, *id.* § 1(2)-(3).

The General Assembly responded to counteract "the decline of the Illinois horseracing and breeding program, a $2.5 billion industry," and thus to bolster "Illinois agriculture and other businesses that support and supply the horse racing industry." Act § 1(3)-(4). The legislature had recently decreased the daily privilege tax rates that all casinos paid (from a top marginal rate of 70% of adjusted gross receipts down to 50%, 230 ILCS 10/13(a-3), (a-4) (2006)), and in 2006 it passed the Act to add an additional, daily tax on casino gambling earnings to improve horse racing tracks and purses. The Act created the Horse Racing Equity Trust Fund ("Fund") to be administered by the Illinois Racing Board. 230 ILCS 5/54.5(a) (2006). For two years, riverboat licensees with adjusted gross receipts in 2004 above $200 million (the four petitioners here) would pay into the Fund each day an amount equal to 3% of the prior day's adjusted gross receipts. 230 ILCS 10/7(a) (2006). The Illinois Racing Board was required to distribute these payments, with 60% going to increase racing purses and the remaining 40% going to

"improve, maintain, market and otherwise operate * * * racing facilities to conduct live racing." 230 ILCS 5/54.5(b) (2006).

Each of the petitioners chose to renew its state owners license after the Act went into effect—Empress in July 2006, Harrah's in September 2007, Hollywood in December 2006, and Elgin in June 2008—although, in Elgin's case, it did so after the Act's two-year tax period ended. See www.igb.state.il.us/annualreport /2008igb.pdf.

4. On May 30, 2006, petitioners filed a complaint in the Illinois courts for declaratory and injunctive relief against the state Treasurer and the Illinois Racing Board. R.C2. Among its claims, the complaint challenged the Act as an unlawful taking under both the Illinois and federal constitutions. R.C12.

On March 26, 2007, the trial court awarded summary judgment for respondents on all of petitioners' theories but one; the court held that the Act ran afoul of the Illinois Constitution's "Uniformity Clause," which limits the State's taxing power. Pet. App. 39a-50a. On April 20, 2007, the court issued its final judgment, declaring the Act unconstitutional on this ground and permanently enjoining respondents from imposing or collecting the 3% tax. Pet. App. 51a-52a (erroneously dated in the appendix as March 26, 2007).

Respondents appealed directly to the Illinois Supreme Court, which unanimously reversed. After holding that the Act complied with the Uniformity Clause, Pet. App. 7a-19a, it proceeded to consider and

(like the trial court) reject petitioners' alternative claims, *id.* at 20a-33a.

As relevant here, the court rejected petitioners' theory that the 3% surcharge was not a tax, but a taking. Pet. App. 20a-26a. The court recognized that calling the surcharge a "license fee," as petitioners urged, did not change its legal status, invoking decisions from around the country rejecting takings challenges to license fees, including in the specific context of gaming licenses. *Id.* at 22a-23a. The court likewise rejected petitioners' reliance on *Northern Ill. Home Builders Ass'n v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995), and *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). The court acknowledged that the former found a monetary fee to be a taking, but that fee "was inextricably tied to real property and, thus, a takings analysis was appropriate." Pet. App. 23a. And although *Apfel* contemplates that money or other intangibles can be the subject of a takings claim, the court below recognized that five Justices in *Apfel* refused to find a taking where, as here, the money need not come from or impair any specific, cognizable property interest. *Id.* at 24a-25a.

Finally, the court held that "[t]he plain language of the Act belie[d]" petitioners' claim that "the primary intended beneficiaries of the surcharge are private parties * * * and not the public." *Id.* at 29a. The court explained that "the principle purpose of the Act is a public one: to stimulate economic activity, including the creation and maintenance of jobs and the attraction and retention of sports and entertainment, particularly betting on horse racing." *Id.* at 30a. Relatedly, the court rejected petitioners' claim that

state law gave the tracks unfettered discretion to apply the proceeds as they please. As a matter of Illinois law, the court concluded, "[t]he track owners cannot simply pocket any of the funds they receive," as those funds are statutorily "earmarked for specific purposes" and "must be used by the tracks for those purposes." *Ibid.*

The court thus concluded that the Act neither "operate[s] upon" nor "alter[s] an identifiable property interest." *Id.* at 26a. Rather, it "involves [the State's] exercise of its taxing powers." *Ibid.* Accordingly, "the surcharge is not a taking of private property within the meaning of the constitutional takings clauses." *Ibid.*

The court subsequently denied rehearing, *id.* at 55a, but stayed its judgment pending the filing and resolution of this petition.

REASONS FOR DENYING THE PETITION

The petition should be denied for several reasons. Most obviously, the question it poses simply is not presented in this case. The Illinois Supreme Court did *not* purport to hold that money can never be the subject of a takings claim, as petitioners repeatedly assert, see Pet. i, 11, 12, 18, 23, and on which their petition critically depends. The court carefully distinguished its own prior decision recognizing that money may form the basis of a takings challenge, and it quoted lengthy passages from *Apfel* to the same effect. The court's actual holding is perfectly consistent with this Court's case law, and implicates neither of petitioners' purported "splits" in authority. In the end, petitioners merely ask this Court to recognize the Act as an example of a monetary assessment that amounts to a taking, either because it is not a "tax" at all or because it is both a "tax" and a "taking." See Pet. 26-30. But even this effort at error correction fails, for it requires the Court to ignore the dispositive fact—little mentioned in the petition or by any of the *amici*—that petitioners are licensees in a state-regulated, limited gambling monopoly.[2]

---

[2] Petitioners tried this same gambit below. As respondents told the Illinois Supreme Court, petitioners "portray themselves as purely private marketplace competitors of the horse racing licensees, when in reality both the plaintiff casinos and the intervenor racetracks hold some of the very limited number of state gambling licenses," meaning they "are shielded from competition in a true market by the State's prohibition on other forms of gambling." Reply Brief of State Appellants at 1.

And petitioners' status as licensees in the State's limited gambling monopoly presents another, independent reason for denying the petition, consistent with respondents' argument below. See Reply Brief of State Appellants at 14 (distinguishing petitioners' takings authority, where "[t]he business receiving the property was not a licensee in an industry created by the State for the purpose of meeting specific public interests"; rather, "[i]t was, as the casinos misleadingly attempt to portray themselves, a purely private entity competing for the public's entertainment dollars"). This is because, for takings purposes, gambling and related licensees are not entitled even to claim a property interest in the undiminished value of their licenses, meaning petitioners' claim fails at the threshold, without reaching any of the issues raised in the petition. See Pet. App. 23a (Illinois Supreme Court opinion below, citing, *inter alia*, *Bobbie Preece Facility v. Commonwealth of Ky.*, 71 S.W.3d 99, 104 (Ct. App. Ky. 2002), which concluded that "an interest which depends totally on regulatory licensing is not a property interest that is compensable under the Takings Clause").

I. This Case Does Not Pose The Question Presented, Nor Is It A Vehicle To Revisit The Relationship Between A "Taking" And A "Tax."

The Illinois Supreme Court's ruling neither diverges from this Court's precedent nor implicates any split in authority, and petitioners claim otherwise only by mischaracterizing that decision. In fact, the court below did not adopt a broad rule that a "State's taking of money from private parties is wholly outside the

scope of the Takings Clause," Pet. i, so the petition's very premise is false. And petitioners' fallback request for error correction ignores key facts, chiefly that petitioners participate in a regulated, limited gambling monopoly.

1. As the Illinois Supreme Court acknowledged, see *supra* pp. 8-9; *infra* pp. 13-14, specific property interests in money may qualify as property for takings purposes, see *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 240 (2003); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 163-170 (1998); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160-164 (1980). Thus, petitioners' claim that the court below announced a "per se" or "categorical" rule to the contrary, Pet. 11, 23, is false.

Petitioners cite *Webb's*, which struck down a Florida law requiring that interpleader funds be deposited in the registry of the county clerk, and the interest earned retained by the county as income. See 449 U.S. at 156 n.1, 164-165. There, the Court relied heavily on Florida law providing that the principal sum deposited in the court's registry was private property, coupled with the "long established general rule" that interest on interpleaded and deposited funds follows the principal and should be allocated to the owners of that principal. *Id.* at 160, 162-163. In *Phillips*, on which petitioners also rely, the Court followed *Webb's* to reach a similar result. Under Texas law, attorneys were required to pool certain client deposits in an Interest on Lawyers Trust Accounts ("IOLTA") account. See 524 U.S. at 161-162. But the interest on these accounts was diverted from the clients to others. See *id.* at 162. The Court found that

the interest was the private property of the clients for Takings Clause purposes, reasoning that the clients owned the principal and, under Texas law, interest is presumed to follow the underlying principal. See *id.* at 164-166. Finally, *Brown* merely confirmed the holding in *Phillips* that interest income on IOLTA accounts is client property. See 538 U.S. at 235.

The rule of *Brown*, *Phillips*, and *Webb's* is that specific property interests in money may qualify as property for purposes of the Takings Clause, but that is not disputed here, where the Illinois Supreme Court correctly determined that the need to pay money in this case is not a taking because the Act does not "operate upon or alter an identifiable property interest," in money or anything else. Pet. App. 26a. This is also consistent with the conclusion reached by five members of this Court in *Apfel*, that government action is not a taking if it does not "target[] a specific property interest," "depend[] upon any particular property," or (as to cash) burden a "specific, separately identifiable fund of money." 524 U.S. at 543 (Kennedy, *J.*, concurring in the judgment and dissenting in part); *id.* at 554, 555 (Breyer, *J.*, with Stevens, Souter, and Ginsburg, *JJ.*, dissenting).

Petitioners seize upon a single phrase in the decision below—that "'regulatory actions requiring the payment of money are not takings'"—to erect the straw-man argument on which much of the petition depends. Pet. 2, 9 (quoting Pet. App. 25a). But this is not the Illinois Supreme Court's holding. In fact, the court repeatedly acknowledged that the Takings Clause can protect money alone. The court thus distinguished its own prior decision in *Northern*

Illinois Home Builders, which applied takings principles to a monetary fee "tied to real property," and quoted at length from Justice Kennedy's concurrence in *Apfel*, which acknowledged that not only "land" but also "an intangible" and "even a bank account or accrued interest" can form the basis of a takings claim. Pet. App. 23a-24a (internal quotations omitted). In short, although the court was not asked to decide whether money alone can *ever* be the subject of a takings claim, the court nevertheless made clear that it can (consistent with its own prior case law, see Pet. App. 23a).

Thus, petitioners' suggestion that the decision below runs afoul of this Court's decisions "apply[ing] takings analysis to personal property of all kinds," Pet. 22, also fails. To reiterate, the Illinois Supreme Court had no doubt that government action that "appropriate[s], transfer[s], or encumber[s] an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest" may violate the Takings Clause. Pet. App. 24a (internal quotations omitted).

2. Petitioners' mischaracterization of the decision below is also essential to their claim that this case implicates two splits in lower court authority—one over "whether, and in what circumstances, a state's taking of money from private persons may constitute a 'taking' in the constitutional sense," and another over the proper application of *Apfel*. Pet. 10-11, 15. Again, the Illinois Supreme Court did not hold that government action requiring the payment of money is never a "taking"; it merely rejected petitioners' effort to

claim a tax—which petitioners may pay from any source and does not deprive them of any recognized property interest in specific funds—as a taking. Petitioners cannot marshal a single case at odds with this principle. To the contrary, the distinction between specific property interests in money (which may qualify for Takings Clause protections), and general obligations to pay a tax, whatever the source of funds (which do not), explains the result in every case in petitioners' first alleged split. And even if there were a split as petitioners describe it, with some courts announcing a *per se* takings exception for cases involving money and others applying something short of a *per se* rule, the Illinois Supreme Court is already in the latter camp, which is the one that petitioners favor. See *supra* pp. 8-9, 13-14. The second suggested split fares no better, for every court to address the issue has concluded that five members of the *Apfel* Court rejected the view, which petitioners seek to resurrect here, that a general liability to pay money is an unconstitutional taking. We consider each purported split in turn.

To manufacture the first, petitioners substantially overstate the holdings of *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001) (*en banc*); *Atlas Corp. v. United States*, 895 F.2d 745 (Fed. Cir. 1990); *BHA Investments, Inc. v. Idaho*, 63 P.3d 474 (Idaho 2003); and *Home Builders Ass'n of Greater Des Moines v. West Des Moines*, 644 N.W.2d 339 (Iowa 2002). Petitioners claim that these decisions announced a "per se rule" that the required payment of money can never be a taking. Pet. 11. But in reality, each court merely declined to apply a takings analysis to a general obligation to pay money. See

Commonwealth Edison, 271 F.3d at 1338-1340 (upholding requirement that utilities pay special assessment toward remediation of environmentally contaminated facilities); *Atlas Corp.*, 895 F.2d at 756-758 (upholding law requiring uranium producers to fund clean-up of uranium tailings piles); *BHA Investments*, 63 P.3d at 480-481 (upholding requirement that buyer of state liquor license pay State 10% of purchase price as transfer fee); *Home Builders Ass'n*, 644 N.W.2d at 351 (upholding law requiring builders and developers to pay fees, as condition of obtaining permits, to maintain local park system). In not one of these cases did the challengers argue that the assessments targeted a property interest in money, much less did the court hold that such an interest cannot form the basis of a takings claim. In language that petitioners omit, the Federal Circuit in *Commonwealth Edison* thus made "clear that a fund of money can be property protected under the Takings Clause," 271 F.3d at 1338 (citing *Phillips* and *Webb's*), while "the mere imposition of an obligation to pay money, as here, does not give rise" to a takings claim, *id.* at 1340.

Because none of these decisions questions the settled principle that specific property interests in money can be the subject of an unlawful taking, they do not conflict with *Smith v. Price Dev. Co.*, 125 P.3d 945 (Utah 2005); *Kirk v. Denver Publ'g Co.*, 818 P.2d 262 (Colo. 1991); or *United States Fidelity & Guaranty Co. v. McKeithen*, 226 F.3d 412 (5th Cir. 2000), as petitioners contend. See Pet. 11-12. In each case, the court found an unconstitutional taking only after *first* finding that the government appropriated money protected by a specific property interest. The

provisions at issue did not merely impose "an ordinary liability to pay money," *Apfel*, 524 U.S. at 554 (Breyer, *J.*), but instead "target[ed] a specific property interest," *id.* at 543 (Kennedy, *J.*). Accordingly, these decisions are perfectly in line with the Illinois Supreme Court's decision below and with the lower court cases discussed above.

Kirk and *Smith* struck down laws providing States with a share of certain punitive or exemplary damages awards. See *Kirk*, 818 P.3d at 266; *Smith*, 125 P.3d at 948. As these courts recognized, the payments depleted plaintiffs' specific, identifiable property interest in favorable litigation judgments. In *Kirk*, state law recognized a property interest in exemplary damages. See 818 P.3d at 267, 272-273. And the law in *Smith* was, "for all intents and purposes, identical to the provision invalidated" in *Kirk*. 125 P.3d at 952. It "gave the State no interest in the judgment entered by the district court," while the plaintiffs "owned the entire punitive damages judgment" and thus had a "vested property interest therein." *Id.* at 950, 952. Likewise, the law invalidated in *United States Fidelity* imposed a retroactive burden on insurers who contributed (or who once had contributed) to a state workers' compensation fund. See 226 F.3d at 414-415. "The assessments against [the] plaintiffs ar[o]se from the specific fund of benefits they pa[id] to claimants in Louisiana each year" and were "charged by the insurers against the fund of reserves set aside from the premiums collected under specific insurance policies." *Id.* at 420. The insurers' monetary obligation therefore "refer[red] to an identifiable property interest or fund," *ibid.*, and was properly characterized as protected property for takings purposes.

Petitioners' reliance on state court decisions striking down fees, assessments, and exactions is equally misplaced. See Pet. 14 & n.8 (citing *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620 (Tex. 2004); *Home Builders Ass'n v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000); *Ehrlich v. Culver City*, 911 P.2d 429 (Cal. 1996); *Trimen Dev. Co. v. King County*, 877 P.2d 187 (Wash. 1994)). In each, the money due was tied directly to the development of a parcel of real property. The Illinois Supreme Court's ruling is fully consistent with these decisions, for it specifically recognized that assessments "inextricably tied to real property" are subject to a takings analysis. Pet. App. 23a (distinguishing its decision in *Northern Illinois Home Builders Ass'n*).[3]

The basis for petitioners' second alleged split is purported "uncertainty" surrounding this Court's decision in *Apfel*. Pet. 15. But there is no uncertainty over the single dimension of *Apfel* at issue here.

---

[3] Petitioners cite *Home Builders Ass'n v. City of Scottsdale*, 930 P.2d 993 (Ariz. 1997), and *McCarthy v. City of Leawood*, 894 P.2d 836 (Kan. 1995), in a footnote. See Pet. 14-15 n.8. But the challengers in both cases waived their takings claims. See *Scottsdale*, 930 P.2d at 999-1000; *McCarthy*, 894 P.2d at 580. Even so, *Scottsdale* indicated that, had a takings claim been preserved, the court would have applied a takings analysis. See 930 P.2d at 1000. And although the court in *McCarthy* suggested that a takings analysis might not be applicable, see 894 P.2d at 580, this statement was *dicta* because the challengers had forfeited their takings claim.

In his concurrence, Justice Kennedy rejected the plurality's determination that the Coal Act, which required former plant operators to fund retiree health benefits, "takes property." 524 U.S. at 539-540. Although the Coal Act "impose[ed] a staggering financial burden" on former employers, Justice Kennedy recognized that, under this Court's prior decisions, a statute that "is indifferent as to how the regulated entity elects to comply or the property it uses to do so" is not a "taking." *Id.* at 540.

Four other members of the Court agreed that the "Takings Clause [did] not apply." *Id.* at 554 (Breyer, *J.*, with Stevens, Souter, and Ginsburg, *JJ.*, dissenting). These Justices recognized that the contrary rule would make every tax a "taking"; it would cast doubt on any law that "creat[es] burdens for some that directly benefit others" and thus subject every tax to a takings challenge. *Id.* at 556 (internal quotations omitted); see also *ibid.* ("If the Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, *i.e.*, when it assesses a tax?"). A majority of the Court thus reaffirmed the rule that, in Justice Kennedy's words, an obligation to pay money does not "implicate the Takings Clause" if it does not "relate to a specific property interest." *Id.* at 544 (Kennedy, *J.*).

There is no lack of "uniform[ity]" among lower courts on this score. Pet. 15. In every one of petitioners' cases, the court drew precisely the same conclusion—that five members of this Court rejected the takings theory in *Apfel* because there was no connection between the employers' monetary obligation

and any specific, identifiable property interest. See *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226, 237 n.17 (4th Cir. 2002); *Commonwealth Edison*, 271 F.3d at 1339; *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 551 (6th Cir. 2001); *United States Fidelity*, 226 F.3d at 420; *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 674 (3d Cir. 1999); *Parella v. Retirement Bd. of the Rhode Island Employees' Retirement Sys.*, 173 F.3d 46, 58 (1st Cir. 1999); *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254 n.5 (D.C. Cir. 1998). In its decision below, the Illinois Supreme Court merely echoed this universally accepted understanding. See Pet. App. 25a.

To be sure, Justice Kennedy and the plurality had different reasons for finding the Coal Act unconstitutional, and thus courts have quibbled over what precedential weight to afford *Apfel*. Some have treated the votes of Justice Kennedy and the four dissenters as a holding. See, *e.g.*, *Commonwealth Edison*, 271 F.3d at 1339 ("We agree with the prevailing view that we are obligated to follow the views of that majority."); see also *id.* at 1339 n.10 (collecting cases). Others have given the decision somewhat narrower effect. See *Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1054 & n.5 (11th Cir. 2008) (declining to decide whether concurring opinion is binding precedent but "agree[ing] with Justice Kennedy that the takings analysis is not an appropriate analysis for the constitutional evaluation of an obligation imposed by Congress merely to pay money"); *A.T. Massey*, 305 F.3d at 237 (*Apfel* "mandates judgment for * * * plaintiffs only if they stand in a substantially identical position to Eastern

Enterprises with respect to both the plurality and Justice Kennedy's concurrence.") (internal quotations omitted). But the Illinois Supreme Court is in the latter camp in any event. It did not purport to be bound by the conclusion reached by the concurrence and dissent in *Apfel*; it merely rejected petitioners' attempt to use *Apfel* affirmatively to find a taking. See Pet. App. 23a-25a.

In fact, no court has ever done what petitioners asked the Illinois Supreme Court to do—adopt the *Apfel* plurality's reasoning and, on that basis, invalidate a law as an unconstitutional taking based on reasoning that five Justices expressly rejected. See Brief of Plaintiffs-Appellees at 38-39. Rather, courts have properly recognized that this part of the plurality opinion cannot be binding. See, *e.g.*, *Swisher Int'l*, 550 F.3d at 1054 n.5. And therefore no court has held, as petitioners urge, that after *Apfel* government action creating a general obligation to pay money violates the Takings Clause.

Indeed, while petitioners trumpet *Ass'n of Bituminous Contractors*, see Pet. 16-17, the challengers in that case did not even forward a takings claim, see 156 F.3d at 1254. And the court there recognized that *Apfel* "renders takings claims *less* attractive to litigants because of the possibility that the five dissenters on the takings issue could form a majority in a later case." *Id.* at 1254 n.5. Likewise, in *A.T. Massey* and *Franklin County Convention Facility* (cited at Pet. 17), courts declined to find a Takings Clause violation—or any other constitutional harm—under *Apfel* because the plaintiffs were not "in a substantially identical position to" the coal operators. *A.T. Massey*, 305 F.3d at 237;

accord *Franklin County Convention Facility*, 240 F.3d at 552 (reasoning that *Apfel* lacks "precedential weight beyond its own facts"). Finally, while the Fifth Circuit identified a Takings Clause violation in *United States Fidelity*, the court acknowledged that the *Apfel* plurality's "takings clause rationale was accepted by only four justices" and carefully reconciled its decision with the concurrence, concluding that a "taking must refer to an identifiable property interest or fund." 226 F.3d at 419-420.

In short, petitioners cannot identify a single case whose holding would spell victory for them here, and thus the resolution of any uncertainty regarding *Apfel* cannot inure in their favor. Accordingly, even if it were necessary for this Court to clarify the precedential effect of *Apfel* (and it is not), this case does not provide a vehicle to do so.

3. Ultimately, petitioners appear to concede the distinction the Court has drawn—and the Illinois Supreme Court acknowledged below—between a general obligation to pay money, like a tax (not a taking) and an obligation to pay part of a specifically identified property interest in money (a taking). But petitioners and their *amici* nevertheless urge the Court to use this case to provide an example of an assessment that is not truly a tax, see Pet. 26-27, or of a tax that is also a taking, see *id.* at 27-30. This effort also fails. Petitioners rely chiefly on their claim that, unlike a proper tax, the Act demands money from a small number of casinos and eventually gives it to a small number of their competitors, not for the public good but for "essentially any purpose" that track owners desire. Pet. 26-29. Petitioners (in line with their *amici*) thus

compare themselves to "big box" stores forced to subsidize more politically potent "local retailers." *Id.* at 30. But this is wrong for several reasons.

First and most obviously, petitioners are not open market competitors. They are licensees in a small, regulated gambling industry, which the State could eliminate entirely under its police powers and that continues to exist only so long as the industry as a whole yields substantial public benefits—including jobs, revenue, and tourism. The Takings Clause does not apply where, as here, the State merely reduces or eliminates value that the State itself has created for private parties, as petitioners themselves recognized below. See Brief of Plaintiffs-Appellees at 60 n.30 (arguing that racetracks "had no right to [a] monopoly" on lawful gambling in Illinois, "[a]nd the State committed no wrong in taking it away from them, in order to promote tourism in the communities with riverboats and to raise * * * revenue"); see also *infra* pp. 32-33. The 3% tax is no more than a reduction in part of the value that the State-regulated gambling monopoly creates for its few licensees, in response to the negative effect that casinos are having on another part of that monopoly. Indeed, the Act is an effort to sustain the gambling industry by ensuring the continued viability of its racing component, with its critical employment and other benefits. See *supra* p. 3. And the tax currently applies to only four casinos because it is a progressive tax, and these are the four highest grossing (of only nine total). Moreover, quite unlike the "big box" example, petitioners undeniably "receive something in return" for the tax. Pet. 28. The State's gambling industry remains healthy enough to provide its anticipated public benefits, meaning

petitioners retain the valuable right to pursue super-competitive profits in Illinois' limited gambling monopoly.

Second, the Illinois Supreme Court expressly rejected petitioners' argument that the tax serves no public purpose, and that track owners have unfettered discretion to spend its proceeds. Applying its "plain language," the Illinois Supreme Court held that "the principle purpose of the Act is a public one"—"to stimulate economic activity, including the creation and maintenance of jobs and the attraction of sports and entertainment"—and, in addition, that "[t]he track owners cannot simply pocket any of the funds they received," as those funds are statutorily "earmarked for specific purposes and must be used for those purposes" as a matter of Illinois law. Pet. App. 29a-30a. These conclusions of state law are dispositive here. See, *e.g.*, *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976).

Finally, petitioners claim that the Act requires payments "drawn from a specified corpus of gross receipts"—making it more like a taking than a general obligation to pay—because casinos "must make *daily* payments of a specified portion of the prior day's adjusted gross receipts for a two-year period." Pet. 18, 27. Petitioners compare this to the tax man hovering behind their dealers to seize 3% of each day's take. See Pet. 27. But the Act merely taxes *an amount equal* to 3% of adjusted gross receipts. It is entirely "indifferent as to how the regulated entity elects to comply or the property it uses to do so." *Apfel*, 524 U.S. at 540 (Kennedy, *J.*). Petitioners' reliance on the requirement that they remit their payment by 3 p.m. the following

day is equally misplaced, for this is nothing more than an easily administrable, bright-line rule (like having to pay personal income tax by the close of business on April 15). As a matter of fact, it is the same deadline that *all* riverboat casinos must meet in paying the daily privilege tax that petitioners do not challenge, see 230 ILCS 10/13(a-10) (2006), and is akin to the race tracks' daily payment obligation. See *supra* pp. 3, 5-6.

In sum, this case does not present the question set out in the petition, implicates no split in authority, and is a far cry from the case that petitioners describe in which free market participants are forced to subsidize their more politically powerful competitors.

II. Petitioners Cannot Establish A Property Interest In The Undiminished Value Of Their Gambling Licenses.

Even if this case presented the question that petitioners pose, and the question were otherwise worthy of review, the fact that petitioners are licensees in a state-regulated, limited gambling monopoly puts that question out of reach, for these circumstances alone require affirmance of the judgment below.

1. To prevail on their Takings Claim, petitioners first must establish a protected property interest. See, *e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-1001 (1984). Only then does one ask whether the Act "effect[s] a taking" of that interest. *Ibid.* Here, petitioners assume that they have a property interest in avoiding the 3% tax on their adjusted gross receipts. But this ignores that these receipts are returns on gambling licenses, and that such government-issued licenses (and financial returns thereon) are not

property within the meaning of the Takings Clause.[4] This alone is grounds to reject petitioners' takings claim, although it is not an issue presented in the petition or worthy of certiorari review, for it applies only to the small subset of cases involving government licensees, especially licensees in heavily regulated, limited monopolies subject to outright prohibition under the State's police power, and it implicates no alleged split in authority.

Whether something is protected property "is determined by reference to existing rules or understandings that stem from an independent source such as state law." *Phillips*, 524 U.S. at 164 (internal quotations omitted). Accordingly, when determining whether a license is property for purposes of the Takings Clause, courts rely on state law for indicia of property ownership, inquiring whether the license may be transferred, assigned, or sold; whether the license holder has the right to exclude others—as demonstrated by the extent of the government's power to regulate the underlying activity—as well as to revoke, suspend, or modify the license; and whether the government has provided by statute or regulation that the license does not confer a property right. See *Ruckelshaus*, 467 U.S. at 1002-1003; *United States v. Fuller*, 409 U.S. 488, 494 (1973).

---

[4] That a license is not property under the Takings Clause does not mean that it cannot qualify for procedural due process protections. Property "is defined much more narrowly" for takings than for due process purposes. *Corn v. Lauderdale Lakes*, 95 F.3d 1066, 1075 (11th Cir. 1996); see also *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540 (2005).

Applying these principles, this and other courts have held that government-issued licenses and permits generally do not create property interests protected by the Takings Clause and, as a result, that government action that diminishes the *value* of those licenses and permits—including, as here, by taxing a portion of the earnings realized on them—cannot be the subject of a takings claim. Thus, in *Raceway Park, Inc. v. Ohio*, 356 F.3d 677 (6th Cir. 2004), the court held that horse-track owners had no property interest in their wagering revenues, for purposes of a takings challenge to an Ohio law redistributing a share of those revenues to competing tracks. See *id.* at 683. Based on its review of state law, the court concluded that "there is no long-standing right to the revenues earned from gambling on horse racing." *Id.* at 682-683; see also *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 439-440 (8th Cir. 2007) (licensed lottery machine owner lacked property interest for takings purposes in state-issued license and, accordingly, in "continued operation of its enterprise," where Iowa law provided that possession of lottery machine license "is a privilege personal to that person or entity and is not a legal right" and prohibited licensees from selling, assigning, or transferring their licenses) (internal quotations and citation omitted).

And in *Fuller*, claimants had no property interest in grazing permits issued for neighboring land under the Taylor Grazing Act, and therefore no right to compensation for the component of their own land value attributable to the right to graze on the adjoining federal property. The permits were revocable, and Congress made clear that they "'shall not create any

right, title, interest or estate in or to the lands.'" 409 U.S. at 489 (quoting statute).

Other cases are to the same effect, finding no property right in the undiminished value of a government-issued license, and therefore sustaining laws reducing that value. See, *e.g.*, *Conti v. United States*, 291 F.3d 1334, 1341-1342 (Fed. Cir. 2002) (fishing permit); *Vanek v. State Board of Fisheries*, 193 P.3d 283, 293 (Ak. 2008) (same); *BHA Investments*, 63 at 480-481 (liquor license); *Bronco Wine Co. v. Jolly*, 29 Cal. Rptr. 3d 462, 495-496 (Ct. App. 2005) (certificates of approval for wine labels); *MEC Pennsylvania Racing, Inc. v. Pennsylvania State Horse Racing Comm'n*, 827 A.2d 580, 593 (Pa. Commw. Ct. 2003) (horse-racing license). In short, the Takings Clause simply is not implicated where, as here, the alleged "taking" of money "is associated with a [license] or permit" that is not itself protected property. *BHA Investments*, 63 P.3d at 481; accord *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 216 (Fed. Cir. 1993). The State has not confiscated petitioners' boats; it has assessed a tax limited by its terms to a small percentage of earnings derived from petitioners' participation in a limited gambling monopoly—a monopoly in which petitioners have no property right to participate at all.

As in *Hawkeye Commodity Promotions*, *Fuller*, and other cases, Illinois law expressly denies casino licensees a "property right" in their licenses. See 86 Ill. Admin. Code § 3000.1105. The license is a "revocable privilege," and holders may not assign, transfer or sell their licenses without state approval, see 86 Ill. Admin. Code §§ 3000.235, 3000.1105—all strikes

against finding a property interest, see, *e.g.*, *Ruckelshaus*, 467 U.S. at 1002-1003. As is the fact that these licensees lack the right to exclude others—in fact, the Gaming Board has exclusive control over the issuance of the licenses, see 230 ILCS 10/5(b)(1), 10/7 (2006), and may revoke or suspend them as the Board "see[s] fit," 230 ILCS 10/5(c)(11).

2. It is thus enough to defeat petitioners' takings claim that the Act taxes a small share of the value of petitioners' gambling licenses, a value in which petitioners have no property interest for takings purposes. But other facts ignored by the petition are themselves independently fatal to petitioners' claim. Petitioners are willing participants in a heavily regulated industry subject to complete elimination under the police power (and all but one opted to renew their license while the Act was in effect, see *supra* p. 7). Gambling "could be, and frequently has been, banned altogether." *United States & Fed. Commc'ns Comm'n v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993); accord *Marvin v. Trout*, 199 U.S. 212, 224 (1905). In addition, "gambling activities are normally matters of state concern," *Iannelli v. United States*, 420 U.S. 770, 790 (1975), and "[t]he power of the State to enact laws to suppress gambling cannot be doubted," *Marvin*, 199 U.S. at 224; see also *Cleveland v. United States*, 531 U.S. 12, 21 (2000) (Louisiana gaming statute "licenses * * * engagement in pursuits that private actors may not undertake without official authorization"). Historically, an entity that accepts a state-issued gambling license obtains no more than "a suspension of certain governmental rights in their favor, subject to withdrawal at will." *Stone v. Mississippi*, 101 U.S. 814, 821 (1879).

Even petitioners must concede, as they did below, that Illinois is "not required to allow gambling" at all. Brief of Plaintiffs-Appellees at 64. Rather than banning it altogether, however, the General Assembly authorizes gambling in limited circumstances, subject to comprehensive regulation and provided it continues to yield public benefits. See *supra* pp. 3-6, 23. Such comprehensive regulation is inconsistent with a takings claim for several reasons. It suggests that any rights in the property have not "vested," *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 55 (1986), or that the property amounts to a gratuity that the government may alter or revoke, see *Bowen v. Gillard*, 483 U.S. 587, 604 (1987). Such intrusive regulation is also incompatible with a reasonable, investment-backed expectation that the claimant will enjoy a continued right to the property, meaning the claimant cannot satisfy the *ad hoc*, factual inquiry for regulatory action that diminishes the property's value by restricting its use. See *Lingle v. Chevron*, 544 U.S. 528, 538-539 (2005) (citing *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978)); see also *Ruckelshaus*, 467 U.S. at 1005; *Mitchell Arms*, 7 F.3d at 216 (takings claim "cannot arise in an area voluntarily entered into and one which, from the start, is subject to pervasive Government control") (internal quotations and citation omitted).[5] For one or more of

---

[5] Because petitioners willingly entered an industry that is both highly regulated and subject to outright prohibition, there was no interference with their investment-backed expectations, a fact that is alone dispositive of their takings claim. See, *e.g.*, *Ruckelshaus*, 467 U.S. at 1006-1007. Should the two remaining "*Penn*

these reasons, "[t]hose who do business in the regulated field," like petitioners here, "cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connolly v. Pension Benefit Guarantee Corp.*, 475 U.S. 211, 227 (1986) (internal quotations omitted).

Central" factors for identifying a regulatory taking warrant consideration, they, too, counsel against a "taking" here. First, as to the "character of the governmental action," *Penn Central*, 438 U.S. at 124, the Act was an effort by the State to protect and preserve its horse-racing industry, and courts have long rejected takings challenges to such legislative "'adjust[ments of] the benefits and burdens of economic life to promote the common good,'" *Raceway Park*, 356 F.3d at 684 (quoting *Connolly v. Pension Benefit Gty. Corp.*, 475 U.S. 211, 225 (1986)). Second, as for "[t]he economic impact of the regulation on the claimant," *Penn Central*, 438 U.S. at 124, the 3% tax is reasonably related to the encouragement of horse racing and, at worst, means that petitioners' gambling revenues are not as much as they would have liked, see *Raceway Park*, 356 F.3d at 685-686 & n.6. Finally, to the extent that petitioners would allege a categorical taking, applicable where there has been a "permanent physical invasion," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), or a deprivation of "*all* economically beneficial uses" of property, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992), this Court has rejected application of *Loretto* to an exaction of money, recognizing that "[i]t is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible." *United States v. Sperry Corp.*, 493 U.S. 52, 62 n. 9 (1989).

Nor is the government required to pay for value that it creates, see *Fuller*, 409 U.S. at 492, or "that it might have destroyed under the exercise of governmental authority other than the power of eminent domain," such as the police power, *ibid.*; see also *Bennis v. Michigan*, 516 U.S. 442, 452 (1996). Thus, in *Fuller*, claimants' land enjoyed added value because it bordered federal property for which grazing permits were available, but this additional value was not compensable on a takings theory, for "[t]hat is a value which the government itself created and hence in fairness should not be required to pay." 409 U.S. at 491, 493 (internal quotations omitted). A contrary rule would require compensation for "the value of a right that the Government * * * can grant or withhold as it chooses," like the value that Illinois creates for licensees in its limited gambling monopoly. *Id.* at 493 (internal quotations and citation omitted). If an industry "can be abolished at any time that the Legislature may deem proper for the safeguarding and protection of the public welfare," *Carney v. Attorney General*, 890 N.E.2d 121, 132 (Mass. 2008) (internal quotations omitted), "claimants operating in such fields should expect that the government can effectively regulate them out of business," *Buhmann v. Montana*, 201 P.3d 70, 91 (Mont. 2008), and have no right "to compensation where the government chooses to modify the program that created the benefit in the first place," *Carney*, 890 N.E.2d at 132.

In the same manner, because Congress has the power "completely to regulate navigable streams," any compensation due upon condemnation of riparian land must omit the land's value as a port site. *United States v. Rands*, 389 U.S. 121, 125 (1967). "[T]hese rights and

values are not assertable against the superior rights of the United States" and thus "need not be paid for when appropriated by" the federal government; in fact, to require payment for such "value would be to create private claims in the public domain." *Id.* at 125-126 (internal quotations omitted).

It is therefore no surprise that courts routinely reject takings claims by gambling enterprises, including claims like petitioners' that arise from a tax on wagering revenues or other restrictions limiting the profitability of a gambling license. See, *e.g.*, *Raceway Park*, 356 F.3d 685-687 (state law requiring racetracks to contribute part of their wagering revenues for redistribution to other racetracks); *Star Northwest, Inc. v. City of Kenmore*, No. C05-2133P, 2006 WL 2372395, at *3-*4 (W.D. Wash. Aug. 10, 2006) (municipal ordinance banning card rooms); *Carney*, 890 N.E.2d at 132 (state law banning parimutuel dog racing); *Mibbs, Inc. v. South Carolina Dep't of Revenue*, 524 S.E.2d 626, 628 (S.C. 1999) (county ban on cash payouts from video poker machines); *Sorema v. Parker*, 22 A.2d 513, 516 (Vt. 1941) (state law banning slot machines); *Preece Facility*, 71 S.W.3d at 104 (denial of renewal application for license to operate charitable gaming establishment). A gambling industry participant's "expectations in its * * * business" must be "discounted by" "the heavily regulated nature of gambling." *Hawkeye*, 486 F.3d at 442; see also *Mitchell Arms*, 7 F.3d at 216 (same for firearms exportation); *BHA Investments*, 63 P.3d at 480 (same for liquor sales); *Bronco*, 29 Cal. Rptr. 3d at 498 (same); *Buhmann*, 201 P.3d at 91 (same for exotic game farming). (And the Illinois Supreme Court relied on *Preece Facility* and other cases in this line for its judgment below. See Pet.

App. 22a-23a.) For this reason, too, petitioners' takings claim fails because petitioners belong to a heavily-regulated state gambling monopoly, an independent ground having nothing to do with the issues petitioners seek to have this Court consider.

* * *

In short, petitioners do not participate in an open, competitive market. They are state licensees exempt from Illinois' anti-gambling laws—allowed to offer casino gambling in exchange for their submission to intensive regulation (backed by the threat of license suspension, revocation, or non-renewal) and ongoing financial and other contributions to the public welfare. Alone or in combination, these facts require affirmance of the Illinois Supreme Court's judgment, making this case a singularly flawed vehicle for addressing the question that the petition presents, were that question even implicated by the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM J. MCKENNA
MARTIN J. BISHOP
JONATHAN W. GARLOUGH
Foley & Lardner LLP
321 North Clark Street
Chicago, Illinois 60654

Counsel for Respondents
Balmoral Racing Club, Inc.
& Maywood Park Trotting
Assoc., Inc.

EDWARD M. WHITE
MICHAEL J. MURRAY
Carey, Filter, White & Boland
33 West Jackson Boulevard
Chicago, Illinois 60604

Counsel for Respondent
Hawthorne Race Course, Inc.

LISA MADIGAN
Attorney General
of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
JERALD S. POST
Ass't Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698

Counsel for Respondents
Alexi Giannoulias &
The Illinois Racing Board

*Counsel of Record

April 9, 2009